

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JUDY NEIMAN	:	ORDER
	:	DTA NO. 819576
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 1997 and 1998.	:	

Petitioner, Judy Neiman, 1227 East 8th Street, Brooklyn, New York 11230, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1997 and 1998.

A small claims hearing was scheduled before Presiding Officer Winifred M. Maloney at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on Tuesday, November 2, 2004 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request, received January 21, 2005, that the default determination be vacated. The Division of Taxation opposed petitioner's application to vacate the default by its response dated February 16, 2005.

Petitioner, Judy Neiman, appeared on this application on her own behalf. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner two notices of deficiency of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York. Notice of Deficiency Number L-018465289, dated September 28, 2000, imposed additional tax of \$3,862.00 plus penalty and interest for tax year 1996. Notice of Deficiency Number L-018465291, dated October 18, 2000, imposed additional tax of \$3,995.00 plus penalty and interest for tax year 1997. The assessments were issued because of the Division’s disallowance of certain deductions claimed by petitioner on her returns as well as disallowance of head of household status for petitioner.

2. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) on March 21, 2001. The request was initially denied by an order issued on May 4, 2001. Petitioner filed a petition with the Division of Tax Appeals (DTA # 818665). Eventually, the BCMS order dated May 4, 2001 was rescinded, and petitioner executed a stipulation to discontinue her proceeding in the Division of Tax Appeals and to return to the conciliation process. The stipulation contained a provision that :

In the event that this matter is not finally resolved in the conciliation process, petitioner shall be entitled to petition for a hearing before the Division of Tax Appeals, but only if a petition for a hearing is filed within 90 days after the conciliation order is issued.

3. A conference was scheduled for August 13, 2002. Petitioner failed to appear at the conference and the conciliation conferee issued a conciliation default order dated August 30, 2002, which sustained the notices of deficiency.

4. On July 16, 2003, petitioner filed a petition with the Division of Tax Appeals challenging the two assessments and opting to have the proceeding conducted in the Small Claims Unit. In its answer dated February 18, 2004, the Division of Taxation asserted that the

petition had been filed more than 90 days from the date the conciliation default order was issued. On September 27, 2004, the assistant calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Office of Counsel of the Division of Taxation advising them that a hearing had been scheduled for Tuesday, November 2, 2004 at 10:30 A.M., at the offices of the Division of Tax Appeals at 641 Lexington Avenue, New York, New York. The notice contained the warning that “[f]ailure to appear at the scheduled hearing may result in the dismissal of the petition.” In addition, petitioner was advised by separate letter that since the timeliness of her petition was at issue, the hearing would be confined strictly to the issue of timeliness.

5. On November 2, 2004 at 10:30 A.M., Presiding Officer Winifred Maloney called the *Matter of Judy Neiman*, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on her behalf. The representative for the Division of Taxation moved that petitioner be held in default. On December 14, 2004, Administrative Law Judge Daniel Ranalli issued a determination finding petitioner in default.

6. On January 21, 2005, the Division of Tax Appeals received petitioner’s request to vacate the default. In her request, petitioner stated with respect to the reason for her failure to appear at the hearing that:

The division of tax appeals designated the hearing scheduled of Tuesday, November 2, 2004 to “confine itself strictly to this timeliness issue” (please see the copy of the tax appeals letter dated September 27, 2004.) The timeliness issue may have been raised with the Division of Tax Appeals. However, I was not furnished with any copy of such issues or papers. I therefore did not have any way to prepare for, nor to respond to any claims. I understood that the court will take this matter up on its own and that no input from me would be accepted or honored in any way. It seemed *clear* from the letter that my appearance was irrelevant thereto, and would not have any positive nor negative impact thereon. In fact it

seemed clear that hearing would be purely between the New York State Tax Auditors and the Judge; but definitely not me. Therefore, it was clear, that it was not important that I appear. (Emphasis in original.)

7. In addition, petitioner complained that documents sent by her to the Division of Taxation were never given by the Division of Taxation's representative to the Division of Tax Appeals presiding officer. Moreover, petitioner complained that the Division of Taxation has failed to provide her a representative to assist in the presentation of her case.

8. With respect to the merits of her case, petitioner submitted several pages of argument as to why her disallowed deductions and head of household status should be allowed. Petitioner submitted nothing which would tend to demonstrate that she has filed a timely petition.

9. On January 25, 2005, a copy of petitioner's application to vacate was sent to the Division of Taxation. On February 16, 2005, the Division of Taxation submitted a response opposing the application to vacate the default. With respect to petitioner's excuse for failure to appear, the Division asserted that the reasons stated by petitioner in her application do not constitute reasonable cause for failure to appear.

10. With respect to the merits of petitioner's case, the Division asserted that petitioner has submitted nothing to demonstrate that her petition was timely filed. In addition, the Division submitted an affidavit with attachments dated October 18, 2004 addressing the timeliness issue. Included in the submission were affidavits of Robert Farrelly, Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services of the Division of Taxation, and of Bruce Peltier, the Mail & Supply Supervisor in the Registry Unit of the Division of Taxation. In his affidavit, Mr. Farrelly attested to BCMS's general procedures for the preparation of conciliation orders and certified mail records ("CMR") and that such procedures were followed in the mailing of the conciliation default orders to petitioner on August 30, 2002.

Mr. Peltier attested to the regular procedures followed by the Registry Unit for delivery of certified mail to branches of the USPS and that such procedures were followed in the mailing of the conciliation orders of default on August 30, 2002. Also included in the submission was the BCMS certified mail record for August 30, 2002 which indicated that certified mail number 7104 1002 9739 0117 0495, addressed to Judy Neiman at 1227 East 8th Street, Brooklyn, NY 11230-5105, was delivered to the Stuyvesant Plaza branch of the USPS along with 78 other pieces of certified mail. The certified mail record indicated that 79 pieces of certified mail were received by the Post Office. The final sheet of the CMR contained the written number “79,” indicating the number of pieces of certified mail received at the post office, as well as the initials of the postal employee receiving them. Added to the CMR is a handwritten notation that the mail sent to petitioner was returned unclaimed and remailed on September 27, 2002.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.13[d][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of*

Fifth Avenue, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that she had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner's explanation of why she did not attend the hearing is not persuasive.

Petitioner received notification of the date of the hearing and was advised that failure to attend the hearing could result in the dismissal of her petition. Moreover, petitioner must have been aware of the importance of attending a scheduled hearing in light of the fact that her request for a conference was dismissed because she defaulted at the conciliation conference, as well. Nevertheless, petitioner maintains that it was clear to her that her attendance at the hearing was not important.

If she was unwilling or unable to attend a hearing in person, petitioner could have sent a representative in her place, could have requested an adjournment of the scheduled hearing or could have introduced her proof by submission. However, petitioner failed to pursue any of these alternatives. Accordingly, I find that petitioner has failed to establish reasonable cause for her failure to appear at her hearing.

D. To have her default vacated, petitioner must also demonstrate that she has a meritorious case. Regardless of any excuse that petitioner may have for failing to appear for her hearing, the default will not be vacated unless petitioner can demonstrate some merit to her case. Since timeliness is the only issue which has been raised by the Division of Taxation at this point, petitioner need only demonstrate that she filed a petition within 90 days after the issuance of the conciliation default order dated August 30, 2002. If she did not, her petition must be dismissed in any event

Petitioner has failed to demonstrate that she filed a petition within 90 days after the issuance of the conciliation default order. In fact, petitioner has failed to address this issue in any manner. On the other hand, the Division of Taxation has introduced adequate proof that petitioner failed to file her petition within 90 days of the issuance of the conciliation default order. The CMR demonstrates that Conciliation Order #186283 was mailed by certified mail to petitioner at her correct address on August 30, 2002. Petitioner did not mail her petition to the Division of Tax Appeals until July 16, 2003. In other words, petitioner was 230 days late in filing her petition.

Accordingly, I find that petitioner has not demonstrated that she has a meritorious case.

E. Petitioner has complained about a number of different matters in her application to vacate her default and in subsequent correspondence submitted by her. To the extent that these matters relate to issues not relevant to the resolution of this application to vacate, they have not been addressed in this order.

F. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued December 14, 2004 is sustained and the petition filed on July 16, 2003 is dismissed.

DATED: Troy, New York
April 14, 2005

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE